FINAL REPORT
OF THE FINANCIAL REMEDIES WORKING GROUP
15 DECEMBER 2014

1. The Financial Remedies Working Group ("the group") was established by the President of the Family Division in June 2014. It has been chaired by Nicholas Mostyn J and Stephen Cobb J.

2. The membership of the group, consisting of members of the judiciary, practitioners and HMCTS officials, is as follows: Nicholas Mostyn J, Stephen Cobb J, HHJ Philip Waller, DJ Edward Hess, DJ Marshall Phillips, Amy Kisser, Lucy Reed, Maggie Rae, Paul Stewart and Jo Wilkinson.

3. The group produced an interim report on 31 July 2014, making a number of recommendations. This final report should be read in conjunction with that interim report.

4. To ensure that full consultation was achieved before the recommendations were finalised, comments were invited on the report from interested organisations and individuals. Responses have been received from the Family Law Bar Association, Resolution, the Family Justice Council and a number of individual practitioners and judges. The responses were predominantly favourable to the recommendations in the report, although some made particular observations on the detail of some of the proposals. The group has now carefully considered all the responses.

5. As with the interim report, this final report will deal with the issues arising by dividing its work into four chapters as follows:-
    - Chapter I - Procedure
    - Chapter II - Litigants in Person
    - Chapter III - Standard Orders in Financial Remedy Proceedings
    - Chapter IV - Arbitration in Family Proceedings

PROCEDURE

Unified Procedure

6. The group's views under this heading in the interim report were that:-

    (i) there should be one unified procedure for all financial remedy applications (i.e. principally financial order applications after a divorce, Children Act Schedule 1 applications, variation applications and applications under Part III Matrimonial and Family Proceedings Act 1984 after leave has been granted);

(ii) there was no need in the single family court era for the separate financial jurisdiction contained in Part I of the Domestic Proceedings and Magistrates Court Act 1978;

(iii) the recent inclusion of variation and Children Act Schedule 1 applications in the short cut FPR Chapter V procedure previously limited to Magistrates Court applications should be reversed;

(iv) the standard forms should be rationalised so that there should be only one Form E (i.e. that Form E1 and E2 should be discontinued and Form E re-designed, perhaps in the form annexed to this report) and one Form A (or at most two versions rather than the 14 currently available).

7. Having considered the responses relevant to this subject the group:-

(i) suggests that, as an exception to the recommendation in paragraph 6(iii) above, the rules should permit an applicant in some limited circumstances (for example on a variation application involving only straightforward income issues with no complicating features such as pension sharing or other capitalisation) to utilise the Chapter V procedure, providing a written justification with the application. Gatekeeping procedures may then be required, to determine on paper whether the Chapter V procedure is appropriate and if so, whether any initial directions are required (for example directing that only the income parts of Form E should be completed); and

(ii) otherwise maintains its recommendations.

Deemed Applications

8. The group's view under this heading in the interim report was that the FPR and/or Form A should be amended to identify that once a Form A is issued by one party to a marriage or civil partnership then, save if the application is expressly stated to be limited to the seeking of a particular remedy, all possible applications by both parties are deemed to have been made and may be granted or dismissed by the court without further application.

9. The group has considered the responses on this subject and, whilst maintaining its recommendation, suggests that the mischief identified here could most conveniently be cured by:-

(i) an amendment to the FPR clarifying that Forms A "for dismissal purposes only" are not a necessary requirement for the proper approval of a consent order, provided that an application has been made by one of the parties; and

(ii) a public reminder to judiciary and practitioners that where a court is seized of a contested dispute it is open to the court to make an order including any remedy it considers appropriate, including those for

which there is no formal application, and that even where one party expressly declines to make an application for a particular remedy, perhaps for tactical reasons, the other party can make that application against himself so that the court has the power to deal with it and possibly dismiss it (see *Dart v Dart* [1996] 2 FLR 286).

Enhancement of FDRs

10. The group's views under this heading in the interim report were that:-

    (i) save where the court has deliberately ordered otherwise in truly exceptional circumstances, the FDR hearing should feature in all cases as a compulsory requirement and that generally no listing for a final hearing should be given until an FDR hearing has taken place and has failed to bring about a resolution of the dispute; and

    (ii) the FPR should be adapted to encourage, wherever possible, the FDR to take place on the first occasion the parties attend court by making clear that the parties should attend the First Appointment prepared to treat it as an FDR and by giving a clear and express power for the judge to impose an FDR at the First Appointment against the wishes of the parties (i.e. it should be made clear that the court will not be bound by views expressed by the parties in Form G).

11. The group has considered the responses on this subject and maintains its recommendations. The group recognises that an FDR is likely to involve more court time than a First Appointment (particularly if litigants-in-person are involved) and that its recommendation, if widely utilised by judges, could cause listing complications; but it is suggested that there are significant benefits to be realised from the recommendation and that flexible listing arrangements should be implemented on a local basis to ensure that the recommendation can be properly adopted. Further, individual judges will no doubt utilise individual FDR strategies. The FDR should also be made an integral part of the Chapter V procedure, with the First Appointment expected to be used for that purpose.

Accelerated First Appointment Procedure

12. The pilot Accelerated First Appointment procedure currently in use at the Central Family Court received a number of favourable responses in the consultation exercise and has been reviewed by the group and found to be a useful scheme, albeit for a limited number of cases (i.e. where further disclosure and/or valuation evidence are plainly necessary and uncontroversial and directions can be agreed between the parties and approved by the court in advance of the First Appointment). The group accordingly recommends that this procedure is adopted nationwide and is now incorporated in an FPR Practice Direction. The group recognised that this will impose time obligations on District Judges and that this should be recognised in local listing arrangements.

Applications for re-opening first instance orders

13. The group is of the view that clarification of the procedures for re-opening first instance orders in financial remedy proceedings is required and would strongly support amendments to the Family Procedure Rules for that purpose. The group has liaised with the Family Procedure Rule Committee (FPRC) which is examining this aspect of procedure and it is understood that the Committee is considering the introduction of a new draft rule providing for the court's power to set aside a final order in specified circumstances. The Committee is undertaking more detailed work on the underlying policy issues and the nature and scope of any provision and the group recommends that this work continue. It is to be noted that two recent decisions of the Court of Appeal in this area (*Sharland v Sharland* [2014] EWCA Civ 95 and *Gohil v Gohil* [2014] EWCA 274) are the subject of appeals to the Supreme Court and the group recognises that any final decisions about amendments to the rules may need to await the outcome of the appeals.

Applications for financial relief after an overseas divorce

14. The group's views under this heading in the interim report were that:-

    (i) the tension between the heading and the body of FPR, r 8.25(1) should be eliminated in favour of providing that an application should normally be made without notice, with the court having power to direct that it be heard on notice; and

    (ii) consideration should be given to the level of judiciary to which such applications should be made, both at the permission stage and at the substantive stage.

15. The group was informed that the FPRC has agreed an amendment to the title to FPR, r 8.25(1) to match the wording of the rule (with the amendment likely to be implemented in April 2015); the group remains of the view that the rule should be adjusted to provide that an application should normally be made without notice.

16. The group noted the recent decision of Holman J in *Barnett v Barnett* [2014] EWHC 2678 (Fam) in which he utilised provisions in The Family Court (Composition and Distribution of Business) Rules 2014, SI 2014 No. 840 to transfer a 1984 Act case to an appropriate Family Court location once the leave stage had been completed. The group recommends an amendment to the FPR to put beyond doubt the availability of this power.

17. Having considered the responses on this subject the group maintains its recommendations. It is further recommended that the issue of what level of judge should grant leave for a 1984 Act application should be determined by a District Judge in a standard allocation box-work procedure.

Efficient Conduct of Final Hearings

18. The group's views under this heading in the interim report were that the *Statement on the efficient conduct of financial remedy final hearings allocated to be heard by a High Court judge whether sitting at the Royal Courts of Justice or elsewhere* dated 5 June 2014 and prepared by Mostyn J should be adopted for all final hearings in the Family Court of financial remedy applications listed for three days or more.

19. Having considered the responses on this subject the group maintains its recommendation.

20. The group wished to endorse the comments of Mostyn J to the effect that:-

    (i) the sentence in the Statement which reads "*Pursuant to rule 22.6(2) the parties' section 25 statements will almost invariably stand as their evidence-in-chief*" does not prevent an individual judge exercising a discretion to permit some evidence-in-chief if that judge considers it appropriate;

    (ii) practitioners and litigants must scrupulously comply with FPR, PD27A, in particular that, subject to a specific prior direction from the court at the Pre-Trial Review, the size of the trial bundle should be limited to a single file containing no more than 350 pages and note the specific comments on this subject, in the judgment of Mostyn J in *J v J* [2014] EWHC 3654 (Fam); and

    (iii) practitioners and litigants should note the comments on the subject of Single Joint Experts in the judgment of Mostyn J in *J v J* [2014] EWHC 3654 (Fam) to the effect that directions for expert evidence should almost invariably be for Single Joint Experts (as opposed to partisan experts) in the first instance.

Legal Costs in Financial Applications

21. The question of costs in financial applications was not expressly considered in the interim report; but the group felt it appropriate to make some comments now in the light of the judgment of Mostyn J in *J v J* [2014] EWHC 3654 (Fam).

22. It is clear that many people feel that the method by which most family lawyers charge (on a time charge basis) is unpredictable and that the overall levels of costs are high. The group believes that this in part drives some litigants to act in person rather than to instruct solicitors.

23. The group has received representations regarding the re-introduction of the Calderbank system. The group is opposed to its reintroduction but does recognise that litigation misconduct needs to be addressed. Rule 28.3 of the Family Procedure Rules 2010 enables the Court to make orders for costs where there is litigation misconduct. This rule needs to be applied more

generally. The group would wish to emphasise that litigants-in-person are not immune from its consequences.

24. Mostyn J in *J v J* [2014] EWHC 3654 (Fam) expressly raised the possibility of fixed price costing and judicial costs capping. The group noted this development, but also noted that these are complex and difficult issues for practitioners and that it would not be appropriate to take the issues further until professional bodies such as Resolution, the Law Society and the FLBA have been given the opportunity to engage in a discussion on the subject.

25. The group suggests that the costs working party of the Family Procedure Rule Committee should be invited to give consideration to costs issues, including the issues of fixed price costing and judicial costs capping.

De-linking Financial Remedy applications from the divorce/dissolution suit

26. The group's views under this heading in the initial report were that:-

    (i) in principle, financial order applications should be de-linked from divorce /dissolution proceedings;

    (ii) the achievement of this aim is currently impeded by the current IT arrangements (i.e. the FamilyMan case management system), but will be significantly more straight-forward once a new IT system (which is currently being considered) has been put in place;

    (iii) whilst the IT problems are being considered there is no reason why the court dealing with the financial order applications arising out of divorce/dissolution applications should be the same court as that dealing with the divorce/dissolution itself provided that full information about the divorce proceedings is provided to the court by the parties at the First Appointment of the financial order application;

    (iv) some amendments would be required to the FPR to achieve de-linking (for example the application/petition for divorce etc should no longer include an application for financial remedy).

27. Having considered the responses on this subject the group maintains its recommendations.

Choice of court

28. The group's view in the interim report was that there are important policy reasons for permitting parties in certain circumstances to take advantage of the specialist environment of the Financial Remedies Unit at the Central Family Court in London and that the Central Family Court should be its own point of entry for financial remedy applications, subject to published criteria.

29. The responses were favourable to this suggestion and the group maintains its recommendation.

LITIGANTS IN PERSON

30. The group has noted the responses made in relation to the full chapter in the interim report on litigants-in-person and maintains its recommendations.

McKenzie Friends

31. The group noted in the interim report that a McKenzie Friends Working Group (MFWG), chaired by Mrs Justice Asplin, was considering the current Guidance in relation to McKenzie Friends, a report having been commissioned by the Judicial Executive Board (JEB).

32. The group was informed by Cobb J that a draft of the Second Report of the MFWG is currently under discussion and that this report will specifically address the issue of paid McKenzie Friends (the first report to the JEB dealt with McKenzie Friends more generally). As the MFWG has not yet reached the end of its deliberations on this difficult issue, Cobb J was unable to give the group any indication of its likely recommendations, but he informed the group that the current plan is for the MFWG report to be submitted to JEB in the second week of December 2014.

33. The group wishes to express the view for consideration by the MFWG that while McKenzie Friends are felt to provide a useful role in many financial remedy cases, in supporting litigants, helping with documents, keeping a note in court etc., those advantages plainly have to be weighed against, for instance, (1) the risks for the vulnerable litigant in financial remedy proceedings in being charged for that service by an unregulated / untrained / unqualified individual, (2) the potential effect on the length and tone of hearings if the McKenzie Friend (especially the paid McKenzie Friend) is permitted to address the court, (3) any (false) expectation which the litigant may have about recovering the cost of the paid McKenzie Friend.

Family Justice Council 'Matrimonial Needs' Working Group

34. The group notes that the "Matrimonial Needs Working Group" chaired by Roberts J hopes and expects to publish a guide on "needs" targeted at litigants-in-person in the first half of 2015.

STANDARD FORM ORDERS IN FINANCIAL REMEDY PROCEEDINGS

35. The group in its interim report recommended the formal adoption under the FPR Part 5 of the following standard orders:-
    (a) Financial Remedies Directions Omnibus – Shorter Version;
    (b) Financial Remedies Directions Omnibus – Longer Version with index;
    (c) Financial Remedies Final Orders Omnibus with index;
    (d) Children Act Schedule 1 Final Orders Omnibus with index;
    (e) Wardrobe of Enforcement Orders; and
    (f) Wardrobe of Committal Orders.

36. The group has considered the responses on this subject and maintains its recommendation.

37. The group recommends that urgent consideration is given to the IT aspects of this recommendation so that the forms, currently available in Word, are as user friendly as possible. The group noted the work of this nature done by DJ Geoff Edwards in relation to the judicial version of the CAP orders and recommends that he be invited, if willing, to carry out similar work on the financial orders. The group recommends that he should be given permission to carry out this work as part of his working itinerary in recognition of the time involved and the wide importance of the work.

ARBITRATION IN FAMILY PROCEEDINGS

38. The group in its initial report made recommendations in relation to Arbitration in Family Proceedings to the effect that:-

    (i) CPR PD 62, paragraph 2 is amended to add the High Court, Family Division to the list;

    (ii) a Family Division equivalent of Form N8 be devised and promulgated; and

    (iii) the President should promulgate the Guidance set out in Annex 12 to the interim report.

39. The group has considered the responses on this subject and maintains its recommendations.

Financial Remedies Working Group
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Stephen Cobb J
HHJ Philip Waller
DJ Edward Hess
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Amy Kisser
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